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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ORLANDERS CARTER,

Defendant and Appellant.

D052140

(Super. Ct. No. SCD201768)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed.

A jury convicted defendant Orlanders Carter of making a criminal threat under Penal Code<sup>1</sup> section 422. On appeal, Carter claims the trial court violated his constitutional and statutory rights when it rejected defense counsel's request to conduct a section 1368 competency hearing after Carter refused to follow counsel's advice and testify at trial. Carter also claims the court violated his constitutional rights when it

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

denied his objection to the prosecution's use of a peremptory challenge. Finally, he claims there is insufficient evidence in the record to show he possessed the requisite intent to support a conviction for violation of section 422.

We conclude the trial court acted well within its discretion when it extensively questioned Carter outside the presence of the jury, found he understood the nature of the proceedings and the evidence against him, and found he understood that his decision not to testify was against the advice of defense counsel. We thus conclude the trial court was not presented with a substantial change of circumstances or with new evidence that gave rise to a "serious doubt" about the validity of Carter's competency.

We also conclude that Carter did not make a prima facie showing of purposeful discrimination by the prosecution in exercising its peremptory challenges to prospective jurors, and that there is substantial evidence in the record to support the jury's verdict that Carter made a criminal threat under section 422. We thus affirm the judgment of conviction.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

At approximately 11:15 p.m. on September 21, 2006, Carter entered Hooters Restaurant in downtown San Diego, went to the bar and just stared at the female bartender. When the bartender for a third time asked Carter if he needed anything or wanted to order something, he aggressively responded, "Just give me a minute."

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<sup>2</sup> We view the evidence in the light most favorable to the judgment. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427.) The factual and procedural history related to the competency and peremptory challenge issues is discussed *post*.

Because Hooters did not have any "bouncers" or other security on duty, its manager, Anna Calisse, approached Carter and asked him if he wanted something. Calisse testified that Carter continued to stare at her and the bartender for about a minute or two, and then in an aggressive tone (again) stated, "Just give me a minute." Because Carter just continued to stare, Calisse asked him to leave the restaurant. When Carter next asked to use the bathroom, Calisse told him it was reserved for paying customers, and reiterated he needed to leave.

Calisse followed a short distance behind Carter as he left the restaurant. Once outside, Carter stopped, leaned over the railing and asked a Hooters customer for a cigarette and a sip of his beer. Calisse testified she made eye contact with Carter and again asked him to leave. Carter said nothing in response.

Calisse walked back inside the restaurant, locked the front door because she did not want any "trouble," and went to the door leading outside to the patio. Calisse opened the patio door and saw that Carter was now leaning over the railing talking to Aaron Valero, a Hooters employee who had just gotten off work. Calisse heard Valero ask Carter to leave, telling Carter he did not want any trouble.

Calisse testified that she again asked Carter to leave, and that she and Valero both told Carter that if he did not do so they would call the police. Rather than leave, Carter became extremely aggressive and agitated, asked Calisse whether she had a license to be there and who she was, and began yelling and cussing at Calisse, "You are a fucking whore, bitch. I am going to fucking beat your ass. Fucking kill you."

Calisse testified Carter yelled and cussed at her for about 30 seconds. Because Carter refused her requests to leave, Calisse gave a predetermined signal to call the police. At some point, Carter went back to the front door of the restaurant and tried to open it, still yelling and screaming at Calisse, "You are a fucking bitch. I will fucking kill you. I will fucking beat your ass. I will beat your face."

Calisse testified she was fearful of Carter when he tried to open the front door and reenter the restaurant. When Carter realized the front door was locked, Calisse testified he became even more aggressive and started to come after her by climbing over the patio railing. At the same time, Carter was yelling at Calisse, "I am fucking going to kill you, bitch," and "I will kill you. I will beat your ass." Calisse testified she was afraid that Carter would attack and beat her.

Valero and another Hooters customer, Tony Urrea, blocked Carter's path to protect Calisse. Urrea testified that the patio railing was about three feet high, that he took seriously Carter's threats to beat Calisse, that he considered the situation serious and that he stood between Calisse and Carter because Carter was "extremely aggressive" and was acting in a hostile manner towards Calisse. Urrea believed that if Carter came over the patio railing he would in fact attack Calisse. Urrea also testified he feared for his own safety as well as for Calisse's safety.

Urrea testified he walked to within two feet of Carter, and told him to leave because the police had been called. As Carter began to calm down, he asked Urrea for a cigarette. Urrea testified Carter promised to leave if he gave Carter a cigarette.

Two San Diego police officers on bike patrol responded to the call. When police arrived, they quickly interviewed Calisse who gave them a description of Carter and told them he had threatened to kill her. One of the police officers, Geoffrey Desesari, testified Calisse appeared to be frightened, as he recalled her hands trembled and her voice cracked as she spoke. The police located Carter shortly thereafter and arrested him.

The jury found Carter guilty of making a criminal threat, in violation of section 422. In a bifurcated proceeding, the trial court found true a prison prior allegation (§§ 667.5, subd. (b), 668), a serious felony prior allegation (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and a strike prior allegation (§§ 667, subds. (b)-(i), 1170.12).

At sentencing on October 3, 2007, the prosecution dismissed Carter's strike prior "in the interest of justice." The trial court imposed the lower term and sentenced Carter to state prison for six years four months.

## DISCUSSION

### A. *Competency*

Carter argues the trial court violated his constitutional and statutory rights by not suspending the trial and conducting a hearing to determine his competency to proceed.

#### 1. *Additional Factual and Procedural Background*

The People initially charged Carter in October 2006 for making a criminal threat against Calisse. During his preliminary hearing, Carter requested a *Marsden* hearing, based on *People v. Marsden* (1970) 2 Cal.3d 118. At the conclusion of the hearing, the court denied his request for appointment of new counsel. Carter's counsel at the time was

deputy public defender Linda Brown, who represented Carter through trial and sentencing.

In November 2006 the court ordered a forensic psychiatrist to examine Carter and determine whether he was competent to stand trial, and to recommend whether the court should order him to take involuntarily medication to restore and maintain competency.

In December 2006 Dr. Haroun, M.D., supervising forensic psychiatrist for the County of San Diego, reported he attempted to meet with Carter but that he refused. However, based on medical records compiled during Carter's previous incarceration, Dr. Haroun determined Carter suffered from severe mental illness and was incompetent to stand trial, and recommended Carter be sent to a state psychiatric hospital and ordered to take antipsychotic medication. At the December 27, 2006, hearing, the court adopted the reports of Dr. Haroun, committed Carter to Patton State Hospital for a three-year term and ordered the treating facility to administer him antipsychotic medication.

At a hearing in mid-April 2007, the court received a March 2, 2007, report from the Department of Mental Health, Patton State Hospital, which concluded Carter had been restored to competency. That report discussed Carter's history of "psychiatric hospitalizations and even a more significant history of engaging in rule-breaking behaviors," his "strong history of substance dependence" and his "unsophisticated means of seeking care and attention through numerous uncorroborated medical complaints where he apparently expects some gratification and gain."

The report noted that on his admission to Patton State Hospital in early February 2007, Carter was quiet and kept to himself, stayed in the restroom for extend periods, and

refused to attend his initial treatment conference and various medical appointments. Hospital staff observed that when approached, Carter would ignore the person speaking, would not give a response and would get up and walk away. However, they also observed that when Carter needed something, "he was able to speak clearly and follow staff directions."

The report further noted that within a short time, Carter showed significant improvement in his ability to interact appropriately with others, was more open and willing to speak, attended treatment conferences and all medical appointments and voluntarily adhered to his medical regimen. In addition, during Carter's staffing conference on March 1, 2007, he stated he trusted defense counsel and felt she was acting in his best interest.

The report also noted Carter understood the charges pending against him and the potential sentence if he was convicted.<sup>3</sup> It found Carter demonstrated a basic understanding of the legal process, as he was "able to clearly state the basic court materials (such as the four pleas, the courtroom personnel and their roles, and plea bargains)" and was "able to discuss the advantages and disadvantages of different pleas concerning his case in substantive detail, including reasonably utilizing the opinion of his legal counsel in determining if the facts he described could work for or against him." The report also stated Carter understood the importance of taking psychotropic medication and agreed to remain adherent to the medication.

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<sup>3</sup> Carter was also charged with a misdemeanor for petty theft, in violation of section 594, subdivision (b)(2)(A). This charge is not a subject of this appeal.

Although the report concluded Carter was competent to stand trial, the report further provided that it was "critical" for Carter to take his prescribed medication while in custody "to best ensure he continued competent." Based on the report and the stipulation of the parties, the court at the April 2007 hearing reinstated the criminal proceedings against Carter.

*2. Carter Rejects the People's Offer and Seeks New Counsel on the First Day of Trial*

Carter's trial commenced on June 5, 2007. Before empanelling a jury, the court questioned Carter to ensure he understood his maximum exposure if he rejected the prosecutor's offer, which was a stipulated prison term of six years four months at 50 percent time. Because Carter had close to a year of custody credits, the court explained to him he would serve a little over two years if he accepted the prosecutor's offer, but that if he rejected the offer, went to trial and was convicted, he faced a maximum term of 12 years in state prison, which in light of his priors would mean he could serve about nine years eight months. Carter stated that he understood, that his attorney had spoken to him about the offer, that he did not get along with his attorney and that he did not threaten to kill Calisse as the prosecutor claimed.

After a short recess to allow Carter to confer with his attorney, the court told Carter it was his decision whether to take the offer or go to trial. The court also answered several questions posed by Carter, who according to his attorney, believed that the testimony of Calisse was insufficient to convict him of making a criminal threat. Before proceeding, the court carefully explained to Carter that if the jury accepted Calisse's

testimony, he could be convicted even if he testified he did not threaten to kill Calisse. After again reminding Carter it was his decision alone to make, and asking him if he needed more time to speak with his attorney, Carter said he understood and wanted to proceed to trial, but that he wanted a new attorney.

The court cleared the courtroom and conducted a *Marsden* hearing. After a lengthy discussion between the court and Carter, the court denied his *Marsden* motion.

### 3. *Trial*

The issue of Carter's competency next arose on June 7, 2007—during the second day of trial. After the prosecution rested, defense counsel called Carter to the stand to testify. Once on the stand, however, Carter refused to testify. Outside the presence of the jury, defense counsel argued Carter was incompetent to stand trial because he would not communicate with her, and because he refused to follow her advice and testify. Defense counsel also argued that up until he was called to the stand, Carter wanted to testify, that she had witnessed him "decompensate" during the trial and that she could not explain why he was refusing to testify when it was in his best interests to do so.

The trial court asked Carter a series of questions to confirm that he had heard and understood the evidence against him, that his counsel had discussed with him the advantages and disadvantages of taking the stand, and that he understood the decision not to testify was against his counsel's advice. In response to defense counsel's statement Carter was not cooperating with her, the court noted: "Well, I don't know that not taking [a] lawyer's advice means not cooperating. I think we have made a pretty good record . . . he understood what you were advising him to do and why you think he should be

testifying. He's communicating with me directly and answering my questions. [¶] . . . I don't want to put words in his mouth and have him explain why he wasn't responding to you because the issue is whether he understands what's going on in this trial and is making a knowing decision based on your advice and his view of the circumstances. [¶] And the fact that he's decided not to testify could be explained in a lot of ways, one of which is reasonable is that he has just determined he doesn't want to put himself through being cross-examined and doesn't want to present his case."

The court next asked Carter whether he was taking his medication, to which Carter responded: "Yeah, I *was* taking medication." (Italics added.) Unsatisfied with his response, the court followed up with Carter, asking him if he was currently taking his medication, to which Carter responded, "Yeah," and then named the medication in response to defense counsel's question.

The court next asked Carter whether he was given the proper dose of medication, to which Carter said: "Yeah. And I had plenty of psych evaluations, Patton and County jail, and all the psych[s] said that I am capable of standing trial. Since I have been back from Patton, the judge says we are going through with it this time. This is what I am hoping for."

The court next asked Carter if he wanted to share with the court why he did not want to follow his counsel's advice, noting he could simply respond, "I don't want to," and the court would accept that, and further noting the court was not trying to "pry" into Carter's decision-making process. In response, Carter told the court: "I just don't want to."

The court thanked Carter, and denied defense counsel's request for a competency hearing under section 1368, observing: "I don't think that there's a basis for referring under [section] 1368. He's communicating. He may not be communicating with you [defense counsel], but he's understanding the advice you gave him and the reasons why and has demonstrated to me that based on his demeanor and the way he's speaking to me that he's made a reasonable decision."

#### 4. *Governing Law*

" 'Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally incompetent. [Citations.] A defendant is incompetent to stand trial if he or she lacks a " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him.' " [Citations.]' " (*People v. Lewis* (2008) 43 Cal.4th 415, 524 (*Lewis*),<sup>4</sup> quoting *People v. Rogers* (2006) 39 Cal.4th 826, 846-847 (*Rogers*); see also § 1367, subd. (a) [a defendant is mentally incompetent to stand trial if, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner"]].)

"A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence." (*People v. Ramos* (2004) 34 Cal.4th 494, 507

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<sup>4</sup> Neither party cited *Lewis*, the most recent California Supreme Court case on this issue, despite the fact *Lewis* was decided *before* any briefs were filed in the instant case.

(*Ramos*).) However, "[b]oth federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.] . . . Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]" (*Lewis, supra*, 43 Cal.4th at p. 524, quoting *Rogers, supra*, 39 Cal.4th at p. 847.)

"But to be entitled to a competency hearing, 'a defendant must exhibit more than bizarre . . . behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel. [Citations.]" (*Lewis, supra*, 43 Cal.4th at p. 524, quoting *Ramos, supra*, 34 Cal.4th at p. 508.) Thus, evidence that "merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing." (*People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9.)

" 'A trial court's decision whether or not to hold a competency hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial.' " (*Lewis, supra*, 43 Cal.4th at p. 525, quoting *Rogers, supra*, 39 Cal.4th at p. 847; see also *People v. Marshall* (1997) 15 Cal.4th 1, 33 (*Marshall*) ["a reviewing court generally gives great deference to a trial court's decision whether to hold a competency

hearing," inasmuch as an "appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper"].) " 'The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction. [Citations.]' " (*Lewis, supra*, 43 Cal.4th at p. 525, quoting *Rogers, supra*, 39 Cal.4th at p. 847.)

Moreover, "[w]hen, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it 'is presented with a substantial change of circumstances or with new evidence' " ' that gives rise to a 'serious doubt' about the validity of the competency finding. [Citation.]' " (*Marshall, supra*, 15 Cal.4th at p. 33; see also *People v. Lawley* (2002) 27 Cal.4th 102, 136.) The trial court may appropriately take into account its own observations in determining whether the defendant's mental state has significantly changed during the course of trial. (*Marshall, supra*, 15 Cal.4th at p. 33; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153 (*Jones*) [the court "need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding"].)

## 5. Analysis

Here, Carter argues the trial court abused its discretion when it rejected defense counsel's motion to suspend criminal proceedings pending a second competency hearing. Carter claims the totality of the circumstances shows he lacked capacity to participate in

his defense, as demonstrated by his refusal to testify at trial against the advice of counsel, by his inability to communicate with counsel, by his counsel's statement to the court that she had witnessed him "decompensate" during the trial and by his behavior on the night of the incident.<sup>5</sup> We disagree.

The record demonstrates that Carter did not lack the *capacity* to participate in his defense or that such (alleged) lack of capacity made him *unable* to communicate with counsel or testify at trial. The record instead supports the finding that Carter made a "knowing decision" not to testify at trial. Indeed, Carter had no trouble whatsoever communicating with the trial court, which extensively questioned Carter only two days earlier in connection with the People's offer to stipulate to a prison term and with Carter's *Marsden* motion.<sup>6</sup> In both instances, the record shows Carter's demeanor and responses to questions demonstrated that he understood the nature of the proceedings, what was at stake and was rational in his decision making.

In addition, the trial court extensively questioned Carter after he refused to testify. Again, the record shows Carter responded to each question posed by the trial court in a manner that demonstrated he understood the nature of the proceedings, the evidence

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<sup>5</sup> Interestingly, Carter does not argue he was incompetent on the morning trial commenced (June 5, 2007). That morning, before a jury was empanelled, Carter chose to reject the People's offer to a stipulated prison term of six years four months, which with credits for time served and the People's offer that he serve only 50 percent of his sentence, would have meant he would serve a little more than two years in prison. Instead, Carter decided to go forward with trial, despite facing a possible 12-year prison term if convicted, which with his priors meant he would serve a nine years eight months.

<sup>6</sup> We reviewed the sealed transcript of the June 5, 2007, hearing on Carter's *Marsden's* motion for the limited purpose of assessing Carter's competency, inasmuch as Carter has not challenged the court's denial of that motion in this appeal.

against him, the implications of his decision not to testify, and the fact his decision not to testify was contrary to counsel's advice. During this colloquy, Carter also stated he was taking his medication and, in response to a question from his counsel, was able to state the name of the medication. Based on the trial court's observations of Carter, the court determined Carter's decision not to testify was reasonable.

That defense counsel stated Carter was incompetent because he refused to cooperate with her and follow her advice does not constitute a substantial change of circumstances warranting a second competency hearing. (See *People v. Medina* (1995) 11 Cal.4th 694, 734 [defendant's continued unwillingness to cooperate with counsel, which was initially demonstrated before the competency hearing, did not constitute substantial evidence of a change in circumstances].) Indeed, Carter made no secret of his dislike of defense counsel. On two occasions, including on the day trial commenced, Carter moved under *Marsden* for appointment of new counsel to replace his public defender, Linda Brown. Carter also told the court before the *Marsden* hearing he wanted new counsel and did not get along with counsel.

In light of such evidence, Carter's decision not to testify—and his lack of cooperation in general with counsel—do not establish a substantial change of circumstances casting a serious doubt on the validity of the court's earlier finding that Carter had been restored to competency (see *Jones, supra*, 53 Cal.3d at p. 1153) and in denying his counsel's renewed motion under section 1368. (See *Ramos, supra*, 34 Cal.4th at p. 507.)

## B. *Batson/Wheeler*

Carter next contends his conviction must be reversed because the prosecutor committed *Batson/Wheeler*<sup>7</sup> error by using a peremptory challenge to excuse an African-American juror based solely on the juror's race. The trial court concluded Carter had not made a prima facie showing of improper use of the peremptory challenge and denied the motion.

### 1. *Governing Law*

The use of peremptory challenges to excuse prospective jurors solely on the basis of a presumed group bias, based on membership in a racial group, violates both the federal and state and Constitutions. (*Batson, supra*, 476 U.S. at p. 89; *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) However, a prosecutor is presumed to have exercised peremptory challenges in a constitutional manner (*People v. Alvarez* (1996) 14 Cal.4th 155, 193), and a defendant bears the burden of making a prima facie showing of purposeful discrimination. (*Ibid.*) To make this showing, the defendant must demonstrate that the persons excluded are members of a cognizable group (*People v. Turner* (1994) 8 Cal.4th 137, 164 (*Turner*), disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5 (*Griffin*)), and produce "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170 [125 S.Ct. 2410].)

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<sup>7</sup> *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).

"When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200 (*Davenport*), disapproved on other grounds by *Griffin, supra*, 33 Cal.4th at p. 555, fn. 5.) A trial court's determination that no prima facie showing of group bias was made is subject to review based on whether substantial evidence supports the ruling. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.) If the trial court overrules the objection based on no prima facie showing, we affirm the ruling "[i]f the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question . . . ." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 (*Howard*), quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092.) A legitimate reason for peremptorily challenging a juror need not be a reason that makes sense, but instead need only be a reason that does not offend equal protection. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

## 2. Analysis

There is substantial evidence in the record supporting the trial court's denial of Carter's *Batson/Wheeler* motion based on a finding that no prima facie case of discrimination had been made; Carter did not establish, based on all of the circumstances, that there was a reasonable inference juror No. 22 was excused because of her race. (*Howard, supra*, 1 Cal.4th at p. 1154.) Juror No. 22, like Carter, was African-American. However, racial identity between the excused juror and the defendant alone does not suffice to raise a prima facie showing (*Davenport, supra*, 11 Cal.4th at p. 1201) and, because juror No. 22 was only one of three African-Americans

among the jury pool and was the only one dismissed, Carter cannot show her dismissal was part of a pattern of excusing African-American jurors.

In addition, Carter argues that the prosecutor's failure to ask any questions of juror No. 22 before dismissing her demonstrates the prosecutor's discriminatory purpose. We disagree. The trial court conducted the initial voir dire and covered the basic issues with juror No. 22, as it did with all other potential jurors in the jury box. During this inquiry, juror No. 22 said she was a nanny and a social worker. This response alone provided sufficient information for the prosecutor to challenge juror No. 22 on nondiscriminatory grounds. (*Turner, supra*, 8 Cal.4th at p. 165 [a prosecutor's reason or reasons for exercising a peremptory challenge "need not be sufficient to justify a challenge for cause," and a juror may be excused "based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias"]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 411 ["it could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing care and social services would not be sympathetic to their case"]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [no prima facie showing where challenged jurors shared characteristic of working in "social services or care giving fields"].)

Under these circumstances, there is substantial evidence to support the trial court's finding Carter did not make a prima facie showing juror No. 22 was excused because of her race, and instead there were legitimate race-neutral grounds upon which the prosecutor might have excused her. (*Howard, supra*, 1 Cal.4th at p. 1155.)

### *C. Sufficient Evidence Supports Carter's Conviction*

Carter next argues his conviction must be reversed because there was insufficient evidence that he harbored the specific intent to threaten Calisse.

#### *1. Governing Law*

In reviewing a judgment for the sufficiency of the evidence, a court must review the evidence in the light most favorable to the judgment, to determine if there is substantial evidence from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) In making this determination, the reviewing court must presume every fact in support of the judgment that the jury could reasonable have deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*.)

Moreover, the "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.) The reviewing court must afford due deference to the fact finder and cannot substitute its evaluation of a witness's credibility for that of the fact finder. (*Ochoa, supra*, 6 Cal.4th at p. 1206.)

Penal Code section 422 makes it a crime to "willfully threaten[ ] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually

carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ."

To prove a violation of section 422, the prosecution was required to establish: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*); § 422.)

Both the language and all the surrounding circumstances must be examined to determine if a threat falls within section 422. (*People v. Gaut, supra*, 95 Cal.App.4th at p. 1431.)

Carter argues there is insufficient evidence in the record to show he harbored the necessary specific intent to threaten Calisse. Under section 422, to constitute a criminal threat the person making it must have the specific intent that it be taken as a threat,

although the individual need not intend actually to carry it out. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659; see also § 422.) A defendant acts with the specific intent to commit a criminal threat if the defendant intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat. (*Toledo, supra*, 26 Cal.4th at p. 228.) In evaluating intent, the setting in which the defendant makes the remarks must be considered. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913-914.)

Carter relies on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 to argue the evidence is insufficient to show he possessed the requisite intent to make a threat for purposes of section 422. *In re Ricky T.* is distinguishable from the instant case, in that the criminal threat there was vague and made by a minor who told his teacher he was "going to get [him]" after the teacher accidentally struck the minor on the head while opening a door. (*Id.* at p. 1135.) Such facts pale in comparison to the evidence in the present case.

Here, the record shows Carter became very aggressive and very agitated after he refused Calisse's repeated requests that he stop bothering the restaurant's customers and leave. Carter asked Calisse whether she had a license to be there and who she was, and began yelling and cussing at Calisse: "You are a fucking whore, bitch. I am going to fucking beat your ass. Fucking kill you." Calisse testified Carter yelled and cussed at her for about 30 seconds.

Rather than just walk away, Carter tried to open the front door of the restaurant to get inside, yelling and screaming at Calisse: "You are a fucking bitch. I will fucking kill you. I will fucking beat your ass. I will beat your face." When Carter realized the door

was locked, Calisse testified he became even more hostile and aggressive, and came after her. Calisse testified she was afraid that Carter would attack and beat her.

The record further shows Valero, an employee of Hooters who had just gotten off work, and Urrea, a customer, stood between Carter and Calisse to protect Calisse. Urrea testified he took seriously Carter's threats to beat Calisse because Carter was "extremely aggressive" and acting in a hostile manner towards Calisse, and believed that if Carter came over the railing he would in fact attack Calisse. Urrea also testified he feared for his safety and as well as for Calisse's.

In addition, police officer Geoffrey Desesari testified he interviewed Calisse shortly after the incident and observed her hands trembling and her voice cracking when she spoke.

This evidence distinguishes *In re Ricky T.* from the instant case, and is more than sufficient to support the finding of the jury that Carter possessed the requisite intent when he threatened repeatedly to "kill" Calisse and "beat her ass," and that Calisse took such remarks/threats as real and serious. (See *Toledo, supra*, 26 Cal.4th at p. 228.)

DISPOSITION

The judgment of conviction is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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HALLER, J.

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McDONALD, J.